DOCUMENT RESUME

ED 282 306 EA 019 372

AUTHOR	Robbins, Jan C.
TITLE	Voluntary Religious Activities in Public Schools: Policy Guidelines. Fastback 253.
INSTITUTION	Phi Delta Kappa Educational Foundation, Bloomington, Ind.
REPORT NO	ISBN-0-87367-253-4
PUB DATE	87
NOTE	42p.; Publication of fastback was sponsored by the Florida State University Chapter of Phi Delta Kappa.
AVAILABLE FROM	Publication Sales, Phi Delta Kappa, Eighth Street & Union Avenue, Box 789, Bloomington, IN 47402 ($.90; quantity discounts).
PUB TYPE	Reports - Descriptive (141) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	Elementary Secondary Education; *Extracurricular Activities; *Freedom of Speech; Higher Education; *Legal Problems; *Religious Discrimination; School Activities; School Buildings; *State Church Separation
IDENTIFIERS	Bender v Williamsport Area School District; First Amendment; Fourteenth Amendment; Lemon v Kurtzman; Public Access; *Religious Freedom; Supreme Court; *Voluntary Participation

ABSTRACT

This booklet was written to help school officials understand the law concerning public forums and voluntary religious activities in public schools. Compliance dilemmas arising from the First Amendment establishment of religion clause and the accompanying free speech and free expression clauses, along with 14th Amendment equal protection provisions, are discussed in the introductory first chapter. The United States Supreme Court has often frowned on government actions appearing to advance religion in schools. Two opposing interpretations, "separation" and "accommodation," are thoroughly discussed in the next two chapters. The "Lemon v. Kurtzman" case (1971), while avoiding definitions, offers a three-part establishment-clause test that looks at secular legislative purpose, primary effect that neither advances nor inhibits religion, and avoidance of excessive government entanglement in determining the constitutionality of state actions. Chapter 3 details a complex District Court decision ("Bender v. Williamsport"), overruled by the Third Circuit Court, that essentially accommodates students' voluntary afterschool religious meetings as part of a school's "limited public forum." This decision was further strengthened by Congress's passage of the Equal Access Act (1984) discussed in a later chapter. Apparently, the free speech clause may protect students' right to pursue voluntary religious activities in school, while the free exercise of religion clause denies this right! To help administrators sift through the confusion, the final chapter suggests policy guidelines defining the public forum status of school facilities. (MLH)

FASTBACK

253

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

[X] This document has been reproduced as received from the person or organization originating it.

[ ] Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Voluntary Religious Activities in Public Schools: Policy Guidelines

Jan C. Robbins

EA 019 372

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
D. Kliewer

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

PHI DELTA KAPPA
EDUCATIONAL FOUNDATION

JAN C. ROBBINS

Jan C. Robbins is head of the Department of English Language and Literature at the University of Northern Iowa in Cedar Falls. He received his B.A. in Journalism and Mass Communication in 1965 from Pennsylvania State University and his M.A. and Ph.D. in Mass Communication in 1968 and 1970 from the University of Minnesota. He previously taught at the University of Minnesota and Rensselaer Polytechnic Institute.

The author's academic specialty is First Amendment and communications law. His research interests include historical development of the public-forum doctrine and application of the doctrine to problems of freedom of speech, press, religion, and assembly in the schools.

Research for this fastback was completed during a leave in 1985 and was partially supported by the University of Northern Iowa Graduate College, College of Humanities and Fine Arts, and the University of Northern Iowa Chapter of Phi Delta Kappa.

Series Editor, Derek L. Burleson

Voluntary Religious Activities in Public Schools: Policy Guidelines

by
Jan C. Robbins

Library of Congress Catalog Card Number 86-63881
ISBN 0-87367-253-4
Copyright © 1987 by the Phi Delta Kappa Educational Foundation
Bloomington, Indiana

This fastback is sponsored by the Florida State University Chapter of Phi Delta Kappa, which made a generous contribution toward publication costs.

Table of Contents

Introduction 7

Establishment of Religion 9

Accommodation of Religion 17

Free Exercise of Religion and Freedom of Speech 22

The Equal Access Act 29

Policy Guidelines 35

Introduction

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

– First Amendment

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

– *14th Amendment*

Do school officials violate the establishment clause of the First Amendment if they permit voluntary religious meetings in public schools? Do they violate the First Amendment's free-exercise or free-speech clauses or the equal-protection clause of the 14th Amendment if they do not permit them?

There is no easy answer to these questions. The law concerning voluntary religious meetings in public schools can be confusing. But school officials must consider these questions in order to avoid costly lawsuits.

The problems become more complex when a school establishes a public forum by allowing students to organize after-school activities that are not directly related to the school's curriculum or by allowing community groups to use the school facilities in the evenings or

weekends. Indeed, a school that establishes such a public forum may be required to permit voluntary religious activities.

While it may seem easiest for schools simply to prohibit all meetings that are not directly related to the curriculum, such a policy is not always possible. Community needs and interests differ, and it may be important for the community to use the school's facilities. For example, a school in a rural area might need to open its facilities to students and the community simply because there are few other places where people can meet.

This fastback provides some policy considerations for schools concerning public forums and voluntary religious activities. Major Supreme Court decisions regarding religion and public schools are reviewed; and the Equal Access Act, which may require schools to accommodate voluntary religious activities, is discussed.

This fastback is not intended as a substitute for the advice of a school attorney. State laws differ, and the courts' interpretations of the law vary among jurisdictions. Implementing a policy on voluntary religious activities in the school requires precise knowledge of the laws that pertain to a particular area. In this case, as in so many others that face school officials, "He who is his own lawyer has a fool for a client."

Establishment of Religion

To the casual observer, it would not seem that a group of students was creating a problem by getting together on their own initiative to pray, read scripture, and discuss their religious experiences in a vacant classroom. But under current interpretations of the First Amendment establishment clause, such meetings may violate the U.S. Constitution.

There is a clear and definite doctrinal distinction between the application of the establishment clause in primary and secondary education and its application in other areas of life. While the Supreme Court has never been troubled by the possibility that government will advance religion through such actions as the use of "In God We Trust" on coins or the opening of Congress with a prayer, it has very often been troubled by government actions that appear to advance religion in schools. This distinction is illustrated in the Court's decisions in cases involving state aid to parochial education. There, for example, the Court has distinguished state aid to parents of parochial school students or to the students themselves, about which it has expressed relatively little concern, from aid to parochial schools, about which it has expressed a great deal of concern. It also has distinguished aid to church-affiliated colleges and universities, which it often has approved, from aid to parochial elementary and secondary schools, which it often has rejected.

The special concern with the establishment of religion in the schools has a number of sources. The most fundamental is the central role that primary and secondary education play in preparing children for democratic citizenship in a pluralistic society. A second is the intimate and vital role – reflected in compulsory attendance laws and immense expenditures from the public purse – that government has come to play in primary and secondary education. A third is the resultant power of government to "cast a pall of orthodoxy over the classroom" (*Keyishian* v. *Board of Regents* 1967). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (*Board of Education* v. *Barnette* 1943). And a fourth is the very real possibility that if the state becomes involved in supporting religious activities in schools, the political community will become divided over whose faith shall be supported.

Courts have found the possibility of state endorsement of religious activities in school particularly worrisome. They have held that there is implied endorsement even if religious activities are voluntary and nondenominational. They have found such activities especially likely to convey an "imprimatur" of state endorsement when they are initiated or conducted by teachers or other school officials, when they seem to be a part of the school curriculum, when they involve younger and therefore more impressionable students, or when they occur on school premises during school hours.

The language of the religion clauses in the First Amendment is firm, but provides no clear guidelines for policymakers. The establishment clause prohibits government from assisting religion; the free-exercise clause prohibits it from hindering religion. Precisely what is forbidden, what allowed or required?

Two opposing interpretations emerged in early establishment-clause cases. The first, a principle of "separation," was articulated by Justice Black in *Everson* v. *Board of Education* (1947):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up

a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

The second interpretation, a principle of "accommodation," discussed more fully in the next chapter, was introduced by Justice Douglas in *Zorach* v. *Clauson* (1952):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

The problem for the Supreme Court has been "to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme,

would tend to clash with the other" (*Walz* v. *Tax Commission* 1970). Two "tests," one for the establishment clause and one for the free-exercise clause, have been developed to solve that dilemma. The remainder of this chapter addresses the establishment-clause test.

In *Lemon* v. *Kurtzman* (1971), then-Chief Justice Burger offered what is now the commonly accepted establishment-clause test. To be constitutional, state action first must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, it must not foster an excessive government entanglement with religion. All three parts must be satisfied for a state action to be constitutional.

The Court in *Lemon* never defined "religion" or what is "religious," but two general tendencies can be discerned in its decisions: 1) *activities* (for example, classroom exercises) will be considered religious when they involve such practices of organized religion as prayer and scripture reading; 2) *organizations* (for example, student groups) will be considered religious when they are affiliated or identified with avowedly religious groups or have a stated or otherwise obvious religious or sectarian objective.

The first, or *secular purpose*, component of the *Lemon* test is the easiest to satisfy. Evidence of an obviously secular purpose on the part of the state normally will suffice; that is, the Court will not invalidate state action unless there is no arguably secular purpose for it or the purpose is obviously religious. On the other hand, the sheer avowal of a secular purpose on the part of the state, absent any credible evidence, will not be sufficient.

The second, or *primary effect*, component of the *Lemon* test is both more complex and more rigorously applied. The Court has defined *impermissible advancement of religion* as "sponsorship, financial support, and active involvement of the sovereign in religious activity" (*Walz*). However, a state action that has as its primary objective the advancement of some legitimate secular goal but that also provides some merely incidental benefit to religion is not thereby automatically disallowed. Benefits are considered incidental when they are inseparable from the achievement of a legitimate secular purpose, are equally available to religious and nonreligious groups or individuals,

and do not carry an imprimatur of state endorsement of religion or religious beliefs and practices. For example, loan of secular textbooks and provision of bus transportation have been held to confer merely incidental religious benefits.

Religious activities on school premises during school hours are problematic because the state's compulsory attendance laws serve to make students a captive audience. Furthermore, such religious activities occur in a highly structured curricular environment, in which it is difficult for students to distinguish them from secular educational functions. Students are closely regulated and controlled in that environment and therefore may find it difficult to avoid exposure to unwanted religious activities. And teachers or other school officials are almost always present at in-school religious activities, thus making it likely that they will at least appear to endorse the religious views involved.

The third, or *excessive entanglement*, component of the *Lemon* test has two aspects. The first has been called "administrative" or "procedural" entanglement; the second is "political" entanglement.

Administrative entanglement may be defined as the need for excessive and continued monitoring, supervision, or surveillance of religious groups or activities by officials of the state. It has been most commonly invoked in cases involving state financial aid to parochial schools. Practices found to produce entanglement in state-aid cases are surveillance of parochial school teachers to ensure that religious inculcation does not occur when teaching secular subjects, auditing of parochial school budgets and other records to ensure that state funds are not used for religious instruction, and frequent professional interaction between public and parochial school teachers and administrators on such matters as curriculum and counseling that may involve religious views.

Student religious activities in public schools also can create administrative entanglements. Administrative supervision of such activities to maintain order, safety, and discipline, which normally is required by school policy or state law, and official monitoring of religious activities to ensure that they are completely voluntary have been found to create excessive entanglement.

Most administrative entanglements create still another kind of entanglement because they "involve the government in the task of defining what was religious and what was non-religious speech or activity – an impossible task in an age where many and various beliefs meet the constitutional definition of religion" (*O'Hair* v. *Andrus* 1979).

Political entanglement results when government actions lead to excessive and continuing sectarian strife in the political community. As the Court said in *Lemon*, "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

Political entanglement, like administrative entanglement, has been most commonly invoked in cases involving state aid to parochial schools. State aid may benefit some religious groups and not others, and thus create sectarian tension. An initial aid program may lead to requests for continuing appropriations, thereby generating continuing sectarian debate. There may be demands for more aid as costs and populations grow, and therefore more political strife is generated and aggressive political constituencies force public debate into hostile sectarian channels.

In contrast to decisions concerning state aid to primary and secondary parochial schools, those concerning state aid to church-affiliated colleges and universities reflect almost no concern with the problem of political entanglement. The reasons are informative. The constituencies who benefit from state aid to these colleges and universities usually are geographically dispersed, while those who benefit from aid to parochial schools are localized in a particular political community. College students are more mature and less impressionable than primary and secondary students, and therefore presumably better able to distinguish between the secular educational purposes of state aid and the aid as a sign of state endorsement of religious views. Church-affiliated colleges and universities are less pervasively sectarian than parochial schools, more open to debate and criticism, and thus more characterized by academic freedom than by sectarian indoctrination. The aid provided to colleges and universi-

ties is almost always for clearly identifiable non-ideological purposes, such as building construction, while that to parochial schools is usually for purposes in which the secular and the religious are less clearly separable, such as teacher salary supplements or curriculum enhancement. Aid to colleges tends to be of a one-time, single-purpose nature rather than continuing and general, and thus is less likely to lead to increasing demands and financial dependency. Finally, aid to colleges is almost invariably extended to a wide range of institutions, many of which are not religiously affiliated at all.

An interesting twist to political entanglement is that it has sometimes been found to follow from administrative entanglement:

> The numerous judgments that must be made by agents of the state [where there is] detailed monitoring and close administrative contact . . . concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. (*Aguilar* v. *Felton* 1985)

The Supreme Court has occasionally used both administrative and political entanglement to justify a decision, but it has ruled that political divisiveness alone will not invalidate otherwise permissible conduct (*Lynch* v. *Donnelly* 1984). Indeed, although the problem of divisiveness along religious lines could be relevant to cases involving student religious activities – for example, if out-of-school groups compete with one another to organize in-school religious clubs or strife among the clubs creates strife in the community – the application of political entanglement to such cases may have been foreclosed:

> The Court's language in *Lemon* respecting political divisiveness was made in the context of . . . statutes which provided either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think, in light of the treatment of the point in later cases . . . the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools. (*Mueller* v. *Allen* 1982)

The future of the *Lemon* test is unclear. Justice Powell has written that it "identifies standards that have proven useful in analyzing case

after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted" (*Wallace* v. *Jaffree* 1985). Justice Brennan has said that "we have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children" (*Grand Rapids School Dist.* v. *Ball* 1985). But in *Wallace*, then-Chief Justice Burger, who wrote the *Lemon* opinion, complained that "the Court's extended treatment of the 'test' . . . suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues." And now-Chief Justice Rehnquist has said that *Lemon* "has simply not provided adequate standards for deciding Establishment Clause cases."

At the least, it must be said that *Lemon* has proven vague in application to cases involving religion in education:

> What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states – the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth – produces a single, more encompassing construction of the Establishment Clause. (*Committee for Public Education* v. *Regan* 1979)

Accommodation of Religion

The early school prayer decisions (*Engel* v. *Vitale* 1962; *Abington School District* v. *Schempp* 1963) made it clear that the establishment clause prohibits the state from *requiring* religious activities in school. The most recent school prayer decision (*Wallace* v. *Jaffree* 1985) and the earliest religious instruction case (*McCollum* v. *Board of Education* 1948) make it equally clear that the establishment clause prohibits the state from actively *encouraging* religious activities in school. But in *Zorach* v. *Clauson* (1952), in which the Supreme Court held that a program allowing students to be released from regular classes to attend devotions and religious instruction in off-campus religious centers did not violate the establishment clause, the Court made it clear that it is permissible for the state to *accommodate* some kinds of student religious activities in some circumstances. Might accommodation be permissible or even mandatory for voluntary, student-initiated meetings for prayer and scripture reading that are held in school facilities on the same basis as other voluntary, nonreligious meetings?

Before 1981 federal courts had almost uniformly held that voluntary, student-initiated religious meetings in public schools violated the establishment clause. In 1981, however, the Supreme Court held in *Widmar* v. *Vincent* that because a public university policy created

a "limited public forum" for meetings of voluntary student groups of all kinds, student religious meetings did not violate the establishment clause and were protected from official interference by the free-speech clause unless the university could show a compelling state interest. In *Bender* v. *Williamsport* (1983) the United States District Court for the Middle District of Pennsylvania extended the *Widmar* holding to public high schools.

The facts in *Bender* were deceptively simple. Williamsport Area High School scheduled two 30-minute voluntary student activity periods each week during school hours. Officially sanctioned groups were permitted to meet in school facilities and given access to school bulletin boards and the public address system. All meetings were voluntary; students who did not wish to participate were free to use the school library, computer station, or career and college materials collection, or to study in home rooms.

A group of students asked the principal for permission to form a club called "Petros" (The Rock) "to promote spiritual growth and positive attitudes in the lives of its members." The club would meet during the activity periods for scripture reading, prayer, and religious discussion; its meetings would be voluntary and supervised by a faculty advisor; it would not use school media to promote its activities.

The group was allowed to hold one meeting, which was attended by 45 students and a faculty monitor. The students read the Bible and prayed; the monitor graded papers and did not participate. Following the meeting the principal informed the students they could not meet again until he had discussed their request with the superintendent.

The students wrote the superintendent, expressing their desire to form a voluntary, nondenominational club "to read some scriptures and pray to God that he might edify [their] minds." After talking with the school attorney, however, the principal and superintendent informed the students they would not be allowed to meet in school, but might meet off campus during the activity periods if they could find a suitable location and advisor. The students appealed to the school board, but the board affirmed the decision. The board president wrote the students:

> The solicitor advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

The students brought suit in U.S. District Court under the Civil Rights Act (42 U.S.C. § 1983) claiming violation of their rights to free exercise of religion, freedom of speech, and equal protection.

At the time of the Petros request, Williamsport had no formal procedure for applying for school sponsorship of voluntary activities; students just asked the principal, orally or in writing, for permission to meet. The only qualifications for sponsorship were that the proposed activity "contribute to the intellectual, physical or social development of the students" and be "otherwise considered legal and constitutionally proper." No previous request had been denied; approved activities had included archery and art, bowling and business English, chemistry and chess, poetry and photography, Spanish and skiing. The activity periods also were used regularly for meetings of student government, class and service organizations, band and choir, and student publications.

It was unwritten policy that all student activities have an adult advisor or monitor approved by the principal. Advisors typically were members of the faculty, but other school employees or parents could serve. There was no policy concerning the appropriate role of advisors, though one had to be present at all student meetings.

In ruling in favor of the students, Chief Judge William Nealon of the district court wrote: "At the outset, it is necessary to emphasize what this case does *not* involve."

> This is not a case where school administrators have adopted a rule or policy requiring, or even allowing, students to meet for religious purposes . . . where a school teacher or other school official has adopted a practice of requiring or encouraging school prayer or other religious

> discussion in his classroom . . . where a teacher or other school official encouraged or counseled the students to request the opportunity to meet . . . [or] where the students represent a particular denomination.

The students, apparently acting on their own initiative, simply requested permission to hold obviously religious meetings on the same basis as nonreligious student groups. The school district denied their request solely on the basis of the religious content of the meetings.

A year later in 1984 the Court of Appeals for the Third Circuit reversed the district court decision, holding that while voluntary, student-initiated religious meetings in a limited forum in a public high school were protected by the free-speech clause, the state's interest in prohibiting them to avoid a violation of the establishment clause was sufficiently compelling to outweigh the students' public-forum rights. The case was then appealed to the U.S. Supreme Court.

On the same day that the Third Circuit Court handed down its decision in *Bender*, Congress passed the Equal Access Act (20 U.S.C. § 4071), which was signed into law in August 1984. The Act, based on *Widmar*, prohibits public secondary schools in which a limited public forum has been created from discriminating against meetings of student groups "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." The Act was explicitly designed to make accommodation of religious meetings *mandatory* in public schools whenever school facilities were opened for other voluntary meetings.

There was considerable hope that *Bender* would settle the constitutional status of voluntary religious activities in school and, with it, of the Equal Access Act. Instead, in March 1986 the Supreme Court vacated the circuit court decision on procedural grounds by a five-to-four vote. The circuit appeal, it said, had been brought by only one member of the school board, while the district court decision had been against the board as a whole; a single member had no standing to pursue the suit.

The Court majority (Blackmun, Brennan, Marshall, O'Connor, Stevens) entirely avoided the constitutional questions, a tactic not uncommon in difficult, controversial cases. The minority (Burger,

Powell, Rehnquist, White) argued that voluntary student religious meetings in high schools were protected by the free-speech clause.

Whatever the explanation, the decision, in the words of the *New York Times*, "was an anticlimactic denouement for one of the most widely publicized issues pending before the Court." It allowed the district court decision to stand, at least in the jurisdiction of the Middle District of Pennsylvania and at least for the time being, thus allowing student religious groups to meet on the same basis as nonreligious groups. It left the Equal Access Act untouched, and it failed to resolve the essential constitutional conflict between establishment of religion and freedom of speech. The next chapter examines the relationship of the free-speech and free-exercise clauses and its implications for public school officials.

Free Exercise of Religion and Freedom of Speech

While students do not have a right under the free-exercise clause to meet for religious purposes on school premises during school hours, they may have a right to do so under the free-speech clause.

The right of free exercise of religion is determined by a two-step test derived from *Sherbert* v. *Verner* (1963). First, one must show that some action of the state burdens his or her ability to practice religion and adhere to religious beliefs. A burden exists "where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or . . . denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs" (*Thomas* v. *Review Board* 1981). Second, once a burden is shown, the state may defend by showing that its action is the least restrictive means of achieving some compelling state interest.

The definitions of "religion" and "religious belief" are considerably broader under the free-exercise than under the establishment clause. The central consideration is whether beliefs play the role of a religion and function as a religion in an individual's life. What is crucial is that beliefs be sincerely held and central to one's faith.

Federal courts uniformly have held either that prohibition of voluntary religious meetings in school does not burden students' faith, since

students are free to worship as they please outside of school, or that the wish to hold such meetings is not based on a central, deeply held tenet of faith. This is not to say that all student free-exercise claims in a public school setting will be held invalid; for example, in the case of a Moslem who must prostrate himself five times daily in the direction of Mecca, a school board might have to make accommodations to permit him to withdraw momentarily from the class. But all the cases thus far decided have involved Christian students, and there is nothing in any version of Christianity that *requires* religious practice in school. The most that can be said is that students or their parents might prefer to have religious activities in school; but the free-exercise clause protects fundamental beliefs, not personal preferences.

If the free-exercise clause does not protect a right to engage in voluntary religious activities in school, the free-speech clause seems to. In *Widmar* v. *Vincent* the Supreme Court held that voluntary student meetings for religious worship and discussion in a public university are forms of speech and association protected by the public-forum doctrine. *Bender* v. *Williamsport* applied *Widmar* to public secondary schools.

The public-forum doctrine governs freedom of speech and association in spaces owned or controlled by government. Three kinds of spaces are distinguished: 1) those which by long tradition have been devoted to assembly and debate; 2) those which were not designed, intended, and primarily used for purposes of expression and association but which the state has opened for use by the public as a place for expressive activity; and 3) those which have not been given over to expression and association either by long tradition or government fiat.

Spaces of the first kind, called "pure" public forums, include streets, sidewalks, and public parks. Spaces of the second kind, called "limited" forums, have been found in university meeting facilities, state fair grounds, school board meetings, and municipal theaters. Spaces of the third kind, called "nonpublic" forums, have been found in U.S. Postal Service letterboxes, military posts, jails and prisons, municipal transit cars, and the grounds of public schools and courthouses.

Spaces do not become public forums merely because they are owned or operated by government or merely because members of the public are allowed to come and go in them. Pure public forums exist because they "have immemorially been held in trust for the use of the public and, time out of mind . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague* v. *C.I.O.* 1939).

Limited forums exist because they have been established and maintained as a result of specific government policy or action. If a government agency, such as a school board, explicitly opens school facilities for communication or association activities, or does not require permission to use the facilities for such activities, or grants permission to use them as a matter of course, or has no stated policy at all concerning their use, then for First Amendment purposes it has turned them into limited public forums.

Creation of a limited forum for some groups, such as students, or some activities, such as meetings of student clubs, does not automatically create a right of access for all groups or activities. Parents or members of the public do not possess a right of access to a school forum just because students have been granted one, nor do students possess a right to hold meetings of voluntary, noncurricular clubs just because they have been allowed to hold meetings of curriculum-related ones. It is in these senses that public forums of the second kind are said to be "limited."

Public-forum doctrine distinguishes two types of regulation of expressive and associative activities in public spaces: 1) regulation of the content of such activities and 2) regulation of the time, place, or manner in which they occur. Basically, content regulation is prohibited; time, place, and manner regulations are permitted.

Content regulation is regulation of speech or association based on its topic or subject matter; speaker or group identity; or message, ideas, or viewpoint. In nonpublic forums the state has broad power to regulate content. It may prohibit access to all but those groups, topics, and activities for which the space was designed and intended and for which it has traditionally been used. Even with respect to speech and association, it may "make distinctions in access on the

basis of subject matter and speaker identity . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (*Perry Education Assn.* v. *Perry Local Educators' Assn.* 1983).

Once property becomes a public forum, limited or otherwise, regulation of content is sharply curtailed even if the state was not required to create the forum in the first place. To justify regulating content in public forums, the state must show that it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. It cannot be justified on grounds that there are alternative means of communication and association available to potential users, or that the users or their activities or views are unpopular, even offensive. Even the fact that the audience is "captive," as students are in public school, will not normally justify content restriction, unless it can be shown that "substantial privacy interests are being invaded in an essentially intolerable manner" (*Cohen* v. *California* 1971) as, for example, when unwilling recipients have pornographic materials thrust upon them.

This is not to say that content restriction is never allowed; certain kinds of content – libel, pornography, obscene words, incitement to violence – have long been held outside the bounds of First Amendment protection. But, in general, once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say (*Police Department of Chicago* v. *Mosley* 1972). It may close the forum altogether, but selective exclusions may not be based on content alone.

Selective content-based exclusions may even run afoul of the equal-protection clause of the Fourteenth Amendment as well as the free-speech clause of the First Amendment. The equal-protection clause is violated if the state intentionally imposes a classification or distinction that leads to unequal treatment of groups or individuals otherwise similarly situated. As the Supreme Court said in *Mosley*:

> Necessarily . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those

> wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.

Thus far, federal courts have held that exclusion of all religious groups from a forum does not violate the equal-protection clause. Exclusion of some groups and not others on the basis of their religious views almost certainly would; and in light of *Widmar* and *Bender*, it is possible that in the future courts will hold that exclusion of religious as opposed to secular content (for example, political or environmental) from an otherwise open forum also constitutes an equal-protection violation.

The state has considerably greater freedom to regulate the time, place, and manner of activities in a public forum than it has to regulate content. Time, place, and manner regulations are essentially "rules of the road" designed to maintain order. They must be clearly and precisely defined, because a vague rule carries the danger of arbitrary and discriminatory application. They must be content neutral; that is, the content of what a speaker has to say may not affect the regulation of time, place, or manner of presenting it (*Young* v. *American Mini Theatres, Inc.* 1976). And they must be reasonable, given the nature of the place and the pattern of its normal activities (*Grayned* v. *City of Rockford* 1971). For example, a parade on a major thoroughfare is incompatible with rush-hour traffic. Among the time, place, and manner restrictions that have been approved by the Supreme Court are those limiting use of sound trucks on city streets, banning demonstrations near a courthouse, regulating by zoning ordinance the location of adult theatres adjacent to residential housing, and banning willful disturbance of school sessions by making loud noises in areas adjacent to a schoolhouse.

The Supreme Court has held that the streets and sidewalks that border school grounds do not lose their "pure" public forum status just because they are near schools, but no court has ever held that schools per se are pure public forums. Instead, they have held that school

officials can, at least in some circumstances, turn schools or some of their facilities into "limited" public forums.

The landmark case is *Tinker* v. *Des Moines Community School Dist.* (1969), in which a small group of students were prohibited from wearing black armbands to school in silent protest of the Vietnam war. The Court said:

> the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. . . . students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross. . . . Instead, a particular symbol – black armbands worn to exhibit opposition to this Nation's involvement in Vietnam – was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

The Court also said, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate" nor "confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, [they] are entitled to freedom of expression of their views."

On the basis of *Tinker* and later public-forum cases, courts have held that school officials have created public forums in school by supporting extracurricular student newspapers, by operating a school-to-parents distribution system for carrying politically partisan messages home, and by making school facilities available to outside speakers and military recruiters during school hours. Similarly, they have held that formal recognition of student groups or associations may not be withheld except on a showing that the groups would materially and substantially disrupt the work of the school or violate the rights of others.

On the other hand, courts also have held that school officials did not create public forums when they sponsored plays and newspapers that were integral parts of the school's educational program, operated a school-to-parents message distribution system that was not used

to carry partisan messages, or operated an internal school mail system for school-related messages.

The public-forum doctrine was first applied to in-school voluntary religious activities in *Widmar*, where the Court held that through its policy of accommodating student meetings, the university created a forum generally open for use by student groups. In contrast, the school district in *Bender* argued that its voluntary student activities period was a mere extension of the curriculum and not a public forum. However, the district court could find nothing to preclude the application of *Widmar* to a high school; and the circuit court held that the district "did indeed create a forum – albeit a limited one – restricted to high school students at Williamsport and also restricted to the extent that the proposed activity promote the intellectual, physical, or social development of the students." In a similar case, another court held that a school district that opened school facilities for community meetings during non-school hours had created a limited forum for those groups and could not deny access to groups that wished to meet for religious purposes (*Country Hills Christian Church* v. *United School District No. 512, Johnson County, Kansas* 1983).

"A high school," said the *Bender* court, "unlike the public streets and parks, is not by tradition a forum for public expression":

> Clearly, use of school premises as a public forum by anyone or any group desiring to avail themselves of full and unrestricted use of first amendment rights would disrupt the educational purpose of a secondary school and thus be inconsistent with the special interests of the Government. The Williamsport Area School District, therefore, would have been justified in refusing to reserve high school property for use as a public forum for expression and would violate no constitutional constraints in doing so.

But the court went on to say:

> when the state decides, albeit on its own motion, to open its facilities for use as a "limited forum," for particular purposes, it assumes a responsibility to explain its exclusion of a qualified group under applicable constitutional criteria. Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.

The Equal Access Act

The Equal Access Act does little more than embody in statute a limited application to schools of the public-forum doctrine developed in the courts. In this respect it is probably superfluous, though useful for raising consciousness among school officials about the requirements of public-forum doctrine. The Act also embodies the belief of a large number of senators and congressmen that voluntary student religious activities in public schools should not be held to violate the establishment clause. In this respect it is a politically expedient and probably successful attempt to influence future court decisions.

The relevant part of the Act reads:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

The appropriate remedy for violation is a suit in U.S. district court to compel compliance.

Under the Act, a *secondary school* is one that provides secondary education as determined by state law. A *limited open forum* is a period during noninstructional time when noncurriculum-related student

groups are given an opportunity to meet on school premises. *Noninstructional time* is that set aside by the school before actual classroom instruction begins or after it ends. *Meetings* are activities of student groups permitted under a school's limited open forum and not directly related to the school curriculum.

A *fair opportunity* for access to a school forum exists if the school uniformly provides for voluntary and student-initiated meetings; if the meetings are not sponsored by the school or its agents; if employees or agents of the school attend religious meetings only in a nonparticipatory capacity (it is not clear whether they may participate in nonreligious meetings); if meetings do not materially and substantially interfere with the orderly conduct of educational activities; and if nonschool persons do not direct, conduct, control, or regularly attend them.

The Act explicitly does not authorize the school or government to:

> influence the content of any prayer or other religious activity . . . require any person to participate in prayer or other religious activity . . . expend public funds beyond the incidental cost of providing the space for student-initiated meetings . . . compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee . . . sanction meetings that are otherwise unlawful . . . limit the right of groups of students which are not of a specified numerical size . . . or . . . abridge the constitutional rights of any person.

Informal guidelines for interpreting the Act were developed by its sponsors together with a variety of civil libertarian, educational, and religious groups and were placed in the *Congressional Record* of 11 October 1984 (S 14473-76). Though nonbinding, they clearly are designed to instruct the courts and school officials of congressional intent.

The guidelines indicate that the Act is not intended to compel any school to open a limited public forum for its students, although "the request of a single student group to organize a meeting or a club which is not directly related to the school curriculum requires the school to determine whether it wants to create such a forum." Such

curriculum-related groups as math or science clubs do not involve establishing a public forum; but allowing religious, political, and service clubs or clubs interested in topics not related to the curriculum does create a public forum. Local school authorities may determine what is and is not curriculum-related, but they cannot defeat the intent of the Act by some all-encompassing definition that arbitrarily results in all but a few clubs being defined as curriculum-related.

The Act is intended to apply only to the times before individual students' school days begin and after they end, including times when other students may be receiving classroom instruction because of split, staggered, or flexible school schedules. A school is not prohibited from opening a limited forum at other times.

School officials may not set a minimum membership requirement as a condition of access to a forum, but they may establish appropriate time, place, and manner regulations, including rules for allocation of available resources (for example, classrooms). They are encouraged to formulate and publish a uniform policy for access to school facilities to avoid problems when access is denied.

Teachers and other school officials may be present at all student meetings. The assignment of a teacher to supervise a meeting, the expenditure of public funds for minimal costs of use of facilities, and the use of school media to announce meetings (as long as the school does not promote them), do not violate the Act and are not to be taken as evidence of sponsorship or endorsement of groups or activities. A school may demonstrate that it is not promoting, endorsing, or otherwise sponsoring groups by publishing a disclaimer to that effect.

Students are entitled to discuss changes in existing law and controversial social and legal issues in school forums and may not be prohibited from doing so because their views are unpopular or because students, parents, teachers, officials, or members of the community disagree with them. On the other hand, the school may exclude groups that are unlawful and may prohibit meetings that "materially and substantially interfere with the orderly conduct of educational activities" or in which unlawful conduct occurs. It is not clear whether meetings or student groups must have an open admission policy; this probably depends on the requirements of state civil rights law.

The Equal Access Act may be unconstitutional under the establishment clause; evidence and precedents are mixed.

In *Wallace* v. *Jaffree* the Supreme Court invalidated Alabama's "moment of silence" statute because it was an effort to return voluntary prayer to the public schools in violation of the secular purpose requirement of the *Lemon* test. The evidence for purpose was the explicit inclusion in the statute of the words "or voluntary prayer" and the explicit testimony of legislative sponsors. Although the Equal Access Act is couched in terms of "equal treatment" for various kinds of First Amendment activity, "religious" activity is explicitly mentioned in it; and House and Senate records state that the purpose of the Act was to ensure that religious speech was to receive equal treatment.

On the other hand, the Supreme Court has expressed "reluctance to attribute unconstitutional motives . . . when a plausible secular purpose for the State's program may be discerned" (*Mueller* v. *Allen*). When the Equal Access Act was first introduced in the Senate, one of its principal sponsors said, "I believe you can equally present this case as purely a matter of freedom of speech . . . and assembly."

The validity of the Act under the secular or primary-effect requirement of *Lemon* is also questionable. Its secular effects are obvious (for example, it protects political speech and assembly), but Supreme Court cases "simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end . . . is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion" (*Committee for Public Education* v. *Nyquist* 1973). If benefits to religion are inseparable from or merely incidental to the achievement of secular ends, they pass the effect test. But in the Equal Access Act the religious benefits are both separable and substantial. On the other hand, in *Widmar* v. *Vincent* the Supreme Court held that "at least in the absence of empirical evidence that religious groups will dominate [the University's] open forum . . . the advancement of religion would not be the forum's 'primary effect'."

Finally, questions can be raised about the validity of the Act under the entanglement requirement of *Lemon*. The Act seems to create at

least one problem of administrative entanglement, since it requires school officials to determine which meetings are "religious" in order to ensure that employees attend them only in a nonparticipatory capacity. It also has the potential of creating problems of political entanglement; anyone familiar with the roles that religious groups, especially fundamentalist ones, have played in recent debates about religion in the schools can readily imagine the divisiveness that could be engendered if a school board declined to open a forum for religious meetings. On the other hand, the administrative entanglement problem presumably can be solved by prohibiting employees from participating in *any* student meeting. The political entanglement problem is purely speculative at this point. The entanglement component as a whole has never been applied to a case involving religious activities in school; and serious doubts about its utility have been expressed by current members of the Supreme Court, especially Chief Justice Rehnquist.

The Equal Access Act probably will stand or fall on the question of legislative intent. But given the Supreme Court's current composition and its increasing tendency to defer to the will of the legislature and executive, it is doubtful that the explicit inclusion of a mention of religion in the Act or the expressed intentions of its supporters will be sufficient to overturn it.

The most important consequences of the Act are these. First, it subjects school officials to even more political pressures than they already face. Its very existence encourages groups of all kinds to seek to open school forums; a school that declines will likely be confronted with numerous objections. This will inevitably tend to further politicize education decision making; and groups disgruntled by the outcome of the local political process will have another means to bring litigation through the federal courts.

Second, once a forum is opened, school officials lose most of their ability to make educationally sound decisions about what happens in it. Incidentally, they also lose the right to exclude arbitrarily the expressions of those views that they or the community dislike. Once a forum is opened, it must be made available to groups of all kinds. And school officials may find it difficult – perhaps impossible –

to ensure that outsiders are not promoting or substantially controlling student groups for their own purposes. Of course, all of this already is a consequence of public-forum doctrine; but it has been easier to ignore little-known public-forum decisions in other jurisdictions than it will be to ignore a highly publicized act of Congress dealing with civil – especially religious – rights.

Finally, and most important in practical terms, the Act virtually compels school officials to decide immediately whether to restrict school time and facilities to purely curriculum-related matters or to open them for noncurricular student expression and association as well. Given the central place of public schools in local communities, the increasing demands made on them to do more and more things as part of the instructional program, and the decreasing availability of funds and resources, this is a decision of considerable educational, political, and legal importance.

34

Policy Guidelines

The principal lesson to be learned from the controversy over voluntary student religious meetings is that the public-forum status of school facilities should not be left to chance. A school can either explicitly establish a policy for use of its facilities in a formal statement, or it can implicitly establish a policy through the actions, conscious or otherwise, of school officials. The latter course is unwise. If any group is given access to school facilities for other than curriculum-related activities, a court may rule that a limited open forum has been created.

Neither the public-forum doctrine nor the Equal Access Act requires school officials to permit voluntary student religious meetings in school. Such activities must be prohibited if the school has a policy that restricts school facilities to curriculum-related uses. However, until there is a definitive ruling on the Equal Access Act, it must be assumed that school officials are required to permit voluntary student religious meetings if the school has a policy that opens facilities to noncurriculum-related uses. The crucial variable is school policy.

Officials, with the help of legal counsel, should devise a sound written policy for use of school facilities. They should negotiate it with the school board and, through the board, with the local community. They should effectively communicate it to students, parents, teachers, school employees, and the community. And they must rigorously adhere to the policy once it is in place.

A sound policy for use of school facilities has three parts: a definition of the kind of forum (nonpublic or limited) they constitute, rules for regulating their use, and procedures for administering access to them.

A complete definition of the forum status of school facilities will specify appropriate uses of the facilities, appropriate users of them, the actual facilities available for use, and the times at which they are available.

School facilities will constitute a nonpublic forum when their use is restricted to activities that directly support the formal instructional program of the school. Under this policy, officials will retain broad power to restrict the activities that take place in them; but they also will be prevented from allowing some activities – meetings of certain hobby groups, social fraternities, senior men's and women's clubs, for instance – that traditionally have taken place in school. If activities that are not related to the curriculum are allowed, then school facilities will constitute a limited open forum. In that case, officials will retain only very limited power to restrict activities and will have to allow, for instance, meetings of political and religious clubs, which traditionally have not been allowed in school.

To make school facilities a nonpublic forum, officials first must decide what "curriculum-related" means. At least one school district has defined curriculum-related activities as those the school may support with public education funds. This ensures that school publications and musical, athletic, and artistic activities are included, while political and religious ones are not. No doubt there are other acceptable definitions, perhaps couched in terms of specific course-content objectives. Definitions couched in terms of broad, general educational objectives, such as fostering intellectual, physical, and social development of students, should be avoided, since almost any activity can be subsumed under them. It was just such a definition that was at issue in *Bender* v. *Williamsport*. Acceptable definitions must narrowly and precisely distinguish appropriate and inappropriate activities. If discretion is left to school officials to make ad hoc distinctions, the definition is subject to the charge of vagueness and, therefore, arbitrary application.

To make school facilities a limited open forum, a much simpler definition may be used. A statement that such a forum exists for "noncurriculum-related activities" will probably suffice. However, the definition also should include a description of the broad mission of public education in the state. Together with the rules for regulating the forum and procedure for gaining access to it, such a description may serve as a hedge against the more outrageous possibilities one can imagine.

Appropriate users of a nonpublic school forum normally will be restricted to enrolled students; school employees and officials already meet in school for curriculum-related purposes as part of their jobs. Appropriate users of a limited open forum may include only students, only members of the public (in evening hours, for instance), or both. Thus the decision to allow a limited open forum is a very important one.

The problem of specifying the actual facilities available for use is not a serious one in the case of a nonpublic forum. Officials may simply designate appropriate spaces for activities other than regular classroom instruction. In the case of a limited forum, however, the facilities included must be precisely delineated. Presumably, vacant classrooms will be included. But what about the auditorium, cafeteria, and gymnasium? If there is no precise specification and all normally used space is occupied, a new group may claim that some other space should be made available. The basic rule is that space limits must be reasonable given the normal pattern of activities in the school; spaces such as the teachers' lounge and administrative offices could justifiably be excluded.

The problem of specifying the times during which facilities are available for use in a limited forum can be complex. While the Equal Access Act applies only to those times before and after formal classroom instruction, the public-forum doctrine applies at all times. Particularly important times to consider are those in the morning and afternoon immediately preceding and following formal instruction, lunch or study hours, free periods, and evenings. A limited open forum even may be created accidentally during formal classes, as it would be, for example, if a social studies teacher invited a local political candi-

date to speak to a class. Therefore, appropriate uses of teacher-controlled time also should be determined, and teachers should be instructed in their public-forum responsibilities. As with space, time constraints in a limited forum must be reasonable given the normal pattern of school activities; if study halls are for *study*, they may be excluded.

The rules for regulating conduct are particularly important. Even in nonpublic forums, they may not unreasonably infringe on First Amendment rights, as they did, for example, in *Tinker* v. *Des Moines*. In limited forums, *any* attempt to impose restrictions may be seen as an infringement on protected rights if the rules are not narrow, clear, precise, and communicated to users.

Rules for maintaining order, discipline, and security; preventing interference with the work of the school; meeting curricular objectives; infringing on the rights of others; assigning advisors and regulating their roles; regulating the activities of outsiders; and regulating the use of school media should be spelled out. Other rules also may be appropriate. However, while the school retains the right to establish rules for the manner in which activities are conducted as well as the times and places in which they occur, the rules must serve a compelling interest and be narrowly drawn to achieve that end.

The final part of a successful policy for use of school facilities is a set of procedures for administering access. These should include at least the following: a statement that permission is required to use the facilities, a method for requesting permission, a specified brief period of time after which a request will be granted or denied, the criteria under which permission may be denied or withdrawn, a method for appealing denial or withdrawal, and a method for speedy review and resolution of appeals.

Because school officials are legally responsible for all activities that take place in the school, the permission requirement for all activities that are not part of official school business is always in order. What must be remembered is that denial of permission is a form of censorship or prior restraint. The First Amendment, and through it the public-forum doctrine, have been held to include a requirement of due process whenever prior restraint of protected activity occurs. Ac-

cess to public facilities for any First Amendment activity can be denied only in accordance with fair and reasonable procedures. Officials may not deny access arbitrarily; therefore procedural safeguards are essential.

The rules for requesting permission to use school facilities should include: those to whom requests should be directed (normally the principal or chief administrative officer), those who may make requests, how the request should be made (in person, in a letter, on a specified form), and what the request should contain (name of the person making the request, description of proposed activities, prospective advisor, etc.).

Once a request is received, officials may allow themselves time to study it, seek additional information, and consult with others (the superintendent, the local board). However, the decision to approve or deny permission may not be unreasonably delayed. A few days should be sufficient.

The criteria by which a request may be denied or withdrawn must be precise, narrow, and specific. As noted above, if facilities are restricted to curriculum-related uses, "curriculum-related" must be clearly defined. If facilities are opened to other activities, criteria for exclusion must be content neutral and must not allow arbitrary or capricious application. In the case of improper activity on the part of groups already using the forum, there should be provisions for a warning prior to final withdrawal of access. The school retains the power to enforce its regulations for use of facilities, to exclude unlawful groups and conduct, to allocate resources, and to adjust requirements to the age and maturity of the students; but it must exercise its power fairly and reasonably.

Provision for appeal when permission is denied or withdrawn should be handled in a manner similar to the original request for permission. The person(s) to whom an appeal may be addressed, the deadline by which it must be made, and the time by which a decision will be reached on the appeal are especially important.

Of course, records should be kept of all requests, including all actions taken and the reasons for them.

39

Once a facilities policy is adopted, school officials must adhere to it rigorously. If they make exceptions to the policy, they may make the school vulnerable to legal actions.

The creation and operation of a sound policy for use of school facilities is not just a matter of effective educational administration; it also is a matter of protecting basic rights. And protecting basic rights is not just a matter of administrative duty; it is a positive opportunity to educate our students and ourselves about the rights we possess and the philosophy behind them. The controversy over voluntary religious activities and use of school facilities provides an eminently "teachable moment," if we have the presence of mind to grasp it. As Justice Jackson wrote so eloquently many years ago in *Board of Education* v. *Barnette*: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms . . . if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

40

PDK Fastback Series Titles

3. Open Education: Promise and Problems
7. Busing: A Moral Issue
8. Discipline or Disaster?
19. Sex Differences in Learning to Read
20. Is Creativity Teachable?
22. The Middle School: Whence? What? Whither?
26. The Teacher and the Drug Scene
29. Can Intelligence Be Taught?
30. How to Recognize a Good School
43. Motivation and Learning in School
47. The School's Responsibility for Sex Education
59. The Legal Rights of Students
60. The Word Game: Improving Communications
66. The Pros and Cons of Ability Grouping
70. Dramatics in the Classroom: Making Lessons Come Alive
78. Private Schools: From the Puritans to the Present
79. The People and Their Schools
80. Schools of the Past: A Treasury of Photographs
81. Sexism: New Issue in American Education
83. The Legal Rights of Teachers
84. Learning in Two Languages
86. Silent Language in the Classroom
87. Multiethnic Education: Practices and Promises
88. How a School Board Operates
91. What I've Learned About Values Education
92. The Abuses of Standardized Testing
93. The Uses of Standardized Testing
95. Defining the Basics of American Education
96. Some Practical Laws of Learning
97. Reading 1967-1977: A Decade of Change and Promise
99. Collective Bargaining in the Public Schools
100. How to Individualize Learning
105. The Good Mind
106. Law in the Curriculum
107. Fostering a Pluralistic Society Through Multi-Ethnic Education
108. Education and the Brain
111. Teacher Improvement Through Clinical Supervision
114. Using Role Playing in the Classroom
115. Management by Objectives in the Schools
116. Declining Enrollments: A New Dilemma for Educators
117. Teacher Centers—Where, What, Why?
118. The Case for Competency-Based Education
119. Teaching the Gifted and Talented
120. Parents Have Rights, Too!
121. Student Discipline and the Law
122. British Schools and Ours
123. Church-State Issues in Education
124. Mainstreaming: Merging Regular and Special Education
126. Student and Teacher Absenteeism
127. Writing Centers in the Elementary School
128. A Primer on Piaget
129. The Restoration of Standards: The Modesto Plan
130. Dealing with Stress: A Challenge for Educators
131. Futuristics and Education
132. How Parent-Teacher Conferences Build Partnerships
133. Early Childhood Education: Foundations for Lifelong Learning
135. Performance Evaluation of Educational Personnel
136. Writing for Education Journals
137. Minimum Competency Testing
138. Legal Implications of Minimum Competency Testing
139. Energy Education: Goals and Practices
140. Education in West Germany: A Quest for Excellence
141. Magnet Schools: An Approach to Voluntary Desegregation
142. Intercultural Education
143. The Process of Grant Proposal Development
144. Citizenship and Consumer Education: Key Assumptions and Basic Competencies
145. Migrant Education: Teaching the Wandering Ones
146. Controversial Issues in Our Schools
147. Nutrition and Learning
148. Education in the USSR
149. Teaching with Newspapers: The Living Curriculum
150. Population, Education, and Children's Futures
151. Bibliotherapy: The Right Book at the Right Time
152. Educational Planning for Educational Success
153. Questions and Answers on Moral Education
154. Mastery Learning
155. The Third Wave and Education's Futures
156. Title IX: Implications for Education of Women
157. Elementary Mathematics: Priorities for the 1980s
158. Summer School: A New Look
159. Education for Cultural Pluralism: Global Roots Stew
160. Pluralism Gone Mad
161. Education Agenda for the 1980s
162. The Public Community College: The People's University
163. Technology in Education: Its Human Potential
164. Children's Books: A Legacy for the Young
165. Teacher Unions and the Power Structure
166. Progressive Education: Lessons from Three Schools
167. Basic Education: A Historical Perspective
168. Aesthetic Education and the Quality of Life
169. Teaching the Learning Disabled
170. Safety Education in the Elementary School
171. Education in Contemporary Japan
172. The School's Role in the Prevention of Child Abuse
173. Death Education: A Concern for the Living
174. Youth Participation for Early Adolescents: Learning and Serving in the Community
175. Time Management for Educators
176. Educating Verbally Gifted Youth
177. Beyond Schooling: Education in a Broader Context
178. New Audiences for Teacher Education

(Continued on inside back cover)

Fastback Titles *(continued from back cover)*

179. Microcomputers in the Classroom
180. Supervision Made Simple
181. Educating Older People: Another View of Mainstreaming
182. School Public Relations: Communicating to the Community
183. Economic Education Across the Curriculum
184. Using the Census as a Creative Teaching Resource
185. Collective Bargaining: An Alternative to Conventional Bargaining
186. Legal Issues in Education of the Handicapped
187. Mainstreaming in the Secondary School: The Role of the Regular Teacher
188. Tuition Tax Credits: Fact and Fiction
189. Challenging the Gifted and Talented Through Mentor-Assisted Enrichment Projects
190. The Case for the Smaller School
191. What You Should Know About Teaching and Learning Styles
192. Library Research Strategies for Educators
193. The Teaching of Writing in Our Schools
194. Teaching and the Art of Questioning
195. Understanding the New Right and Its Impact on Education
196. The Academic Achievement of Young Americans
197. Effective Programs for the Marginal High School Student
198. Management Training for School Leaders: The Academy Concept
199. What Should We Be Teaching in the Social Studies?
200. Mini-Grants for Classroom Teachers
201. Master Teachers
202. Teacher Preparation and Certification: The Call for Reform
203. Pros and Cons of Merit Pay
204. Teacher Fairs: Counterpoint to Criticism
205. The Case for the All-Day Kindergarten
206. Philosophy for Children: An Approach to Critical Thinking
207. Television and Children
208. Using Television in the Curriculum
209. Writing to Learn Across the Curriculum
210. Education Vouchers
211. Decision Making in Educational Settings
212. Decision Making in an Era of Fiscal Instability
213. The School's Role in Educating Severely Handicapped Students
214. Teacher Career Stages: Implications for Staff Development
215. Selling School Budgets in Hard Times
216. Education in Healthy Lifestyles: Curriculum Implications
217. Adolescent Alcohol Abuse
218. Homework—And Why
219. America's Changing Families: A Guide for Educators
220. Teaching Mildly Retarded Children in the Regular Classroom
221. Changing Behavior: A Practical Guide for Teachers and Parents
222. Issues and Innovations in Foreign Language Education
223. Grievance Arbitration in Education
224. Teaching About Religion in the Public Schools
225. Promoting Voluntary Reading in School and Home
226. How to Start a School/Business Partnership
227. Bilingual Education Policy: An International Perspective
228. Planning for Study Abroad
229. Teaching About Nuclear Disarmament
230. Improving Home-School Communications
231. Community Service Projects: Citizenship in Action
232. Outdoor Education: Beyond the Classroom Walls
233. What Educators Should Know About Copyright
234. Teenage Suicide: What Can the Schools Do?
235. Legal Basics for Teachers
236. A Model for Teaching Thinking Skills: The Inclusion Process
237. The Induction of New Teachers
238. The Case for Basic Skills Programs in Higher Education
239. Recruiting Superior Teachers: The Interview Process
240. Teaching and Teacher Education: Implementing Reform
241. Learning Through Laughter: Humor in the Classroom
242. High School Dropouts: Causes, Consequences, and Cure
243. Community Education: Processes and Programs
244. Teaching the Process of Thinking, K-12
245. Dealing with Abnormal Behavior in the Classroom
246. Teaching Science as Inquiry
247. Mentor Teachers: The California Model
248. Using Microcomputers in School Administration
249. Missing and Abducted Children: The School's Role in Prevention
250. A Model for Effective School Discipline
251. Teaching Reading in the Secondary School
252. Educational Reform: The Forgotten Half
253. Voluntary Religious Activities in Public Schools: Policy Guidelines
254. Teaching Writing with the Microcomputer
255. How Should Teachers Be Educated? An Assessment of Three Reform Reports
256. A Model for Teaching Writing: Process and Product

Single copies of fastbacks are 90¢ (75¢ to Phi Delta Kappa members). Write to Phi Delta Kappa, Eighth and Union, Box 789, Bloomington, IN 47402 for quantity discounts for any title or combination of titles.